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In The

Supreme Court of the United States

October Term 1979

No. 79-260

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,

Petitioner,

vs.

STATE OF IDAHO, ET AL.

BRIEF OF AMICI CURIAE, STATES OF ARIZONA, CALIFORNIA, COLORADO, MONTANA, NEVADA, OREGON, UTAH, WASHINGTON AND WYOMING IN SUPPORT OF STATE OF IDAHO

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TABLE OF CONTENTS

Pages

I. Interest of *Amici* 1

II. Questions Presented 3

III. Argument:

A. The Language of the Carey Act Grants Federal Lands to the States Upon Compliance With the Conditions Set Forth in the Act 3

B. Congress Intended the Carey Act to be a Conditional Grant to Western States 7

C. Case Law Supports the Lower Court's Decision 9

D. There is no Consistent Administrative Interpretation Contrary to the Lower Court's Decision 11

IV. Conclusion 15

Appendix "A"—Addresses of Amici 16

TABLE OF AUTHORITIES

Cases Cited

Idaho Irrigation Co. v. Gooding, 265 U.S. 518 (1923) 10

Payne v. Central Pacific R. Co., 255 U.S. 228 (1921) ... 8

State of Wyoming, 36 Pub. Lands Dec. 399 (1908) 11, 12

State v. Marshall, 52 P. 268 (Mont. 1898) 11

State v. Wright, 44 P. 89 (Mont. 1896) 10

TABLE OF AUTHORITIES—Continued

Pages

Twin Falls Land and Water Co. v. Twin Falls Canal Co., 7 F. Supp. 238 (D. Idaho 1933) 10

United States v. Reeb, 433 F. 2d 381 (9th Cir. 1970) ... 5

Volkswagenwerk v. FMC, 390 U. S. 261 (1968) 12

Wilshire Oil Company v. Costello, 348 F. 2d 241 (9th Cir. 1965) 6

Yakima Development Co. v. Washington, 34 Pub. Land Dec. 453 (1906) 12

Statutes Cited

Carey Act of August 18, 1894, 43 U. S. C. § 641 (1970) 1-15

26 Cong. Rec. 8390-92 (Aug. 10, 1894) 7

Act of June 11, 1896, 43 U. S. C. §§ 641-42 (1970) 4, 9

Federal Land Policy and Management Act of 1976, 43 U. S. C. §§ 1701-1782 (1970) 9

Carey Act Regulations, 37 Pub. Lands Dec. 624 (1909) 13

Texts Cited

III *Kinney on Irrigation and Water Rights* § 1325, (2d ed. 1921) 5

III *Kinney on Irrigation and Water Rights* § 2388 *et seq.* (2d ed. 1921) 6

M. Williams, *The History of Development and Current Status of the Carey Act in Idaho*, 5 (1970) 2, 5

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I.
INTEREST OF AMICI

The western states named herein as *amici curiae* contain lands which have been transformed into economically productive and socially inhabitable regions because of federal policy promoting reclamation of desert lands. Pursuant to this policy, Congress enacted the Carey Act in 1894. By this time most of the land with an available source of water had been reclaimed and was under cultivation. The lands settled by the earliest settlers were closest to the natural waterways, and it soon became evident that lands lying further in proximity from streams could be cultivated only by construction of irrigation and diversion works. Neither the Homestead Act nor the Desert Land Act offered the necessary format for such reclamation projects. The Carey Act offered the solution.

Under its provisions, states were granted a right of entitlement under which the federal government would convey to the state desert lands free from cost whenever an ample supply of water was furnished to reclaim the lands within the statutory period. Once such lands were reclaimed, settled, and put under cultivation, as required by the Act, the United States was bound to transfer title to the state. The state, in turn, had the power to make any contract necessary to secure the reclamation of the lands. When the conditions of this contract were executed, the project was generally turned over to the operating company which would in turn contract with settlers for the sale of water rights and pertinent lands. The contract would also include the terms for turning the project over to the settlers, and the establishment of the settlers' operating company.

Almost immediately after the passage of the Carey Act, many state legislatures in the western United States, including those named herein as *amici curiae,* enacted laws accepting the conditions of the federal grant. M. Williams, *The History of Development and Current Status of the Carey Act in Idaho,* 5 (1970).

Improving technology for bringing lands under irrigation has revived interest in Carey Act developments. The Act is still a valid federal land law and is as ready for operation today as it was in 1894 with a full body of active federal laws and regulations. The Act and its legislative history, as well as pertinent case law, demonstrate that the Act granted to each state a right of entitlement to desert lands upon compliance with the provisions of the Act. The Secretary's duty is to assure compliance with

the Act. Once the state has complied, the Secretary is mandated to transfer title to the state.

The lower court's decision is in accord with the terms of the Act and its legislative intent. The *amici* thus wish to advise the Court of their position in support of the lower court's decision.

II.

QUESTIONS PRESENTED

1. Whether the Carey Act, as amended, conferred upon the State of Idaho a right of entitlement to three million acres of desert land suitable for irrigation, cultivation and settlement.

2. Whether the Secretary of Interior must issue to the State of Idaho patents to suitable desert lands to the extent of Idaho's remaining Carey Act entitlement upon Idaho's compliance with the terms of the Act.

III.

ARGUMENT

A. The language of the Carey Act grants federal lands to the states upon compliance with the conditions set forth in the Act.

The United States argues that the Secretary was given absolute discretion over grants under the Carey Act, and that therefore the state has no enforceable entitlement

with respect to irrigable desert lands. The Carey Act, however, is not a legislative authorization to the Secretary allowing him to make desert lands available for settlement and patent at some future date if he so desires. It is instead an absolute grant of federal lands to the public land states upon condition that the states proceed to identify and reclaim desert lands in accordance with the provisions of the Act. If they do so, the Secretary is directed to issue patents to the states.

The Carey Act reads in pertinent part as follows:

> To aid the public land states in the reclamation of the desert lands therein, and the settlement, cultivation and the sale thereof in small tracts to actual settlers, the Secretary of the Interior is, as of August 18, 1894, authorized and empowered, upon proper application of the state to contract and agree, from time to time, with each of the states in which there may be situated desert lands . . . *binding the United States to donate, grant and patent to the state* free of cost for survey or price such desert lands, not exceeding one million acres in each state. . . .
>
> * * *
>
> *As fast as any state may furnish satisfactory proof* according to such rules and regulations as may be prescribed by the Secretary of Interior, that any of said lands are irrigated, reclaimed and occupied by actual settlers, *patents shall be issued to the states or its assigns*. . . . 43 U. S. C. § 641 (1970). (Emphasis added.)

The Act thus created a contract between the federal government and the state. The federal government contracted to donate and grant desert lands, which offer had to be accepted by the states to become effective. Once accepted, the offer created a contractual obligation binding upon

both the state and the federal government. III *Kinney on Irrigation and Water Rights,* § 1325 (2d ed. 1912), provides as follows:

> The first step to be taken by a state which wishes to avail itself of the benefits of the grant made by the Carey Act of the one million acres of land is to accept the terms of the grant and to provide for the machinery for the reclamation of the land. The power of the state is limited to the acceptance of the offer of the United States, and the execution of the trust assumed by the acceptance thereof.

When the State of Idaho enacted enabling legislation accepting the offer of the federal government, a binding contract was created. Under this contract, "the federal government and the state covenanted that the federal government would convey to the state the land free from costs whenever an ample supply of water was furnished to reclaim the lands, provided the lands were reclaimed in the statutory period." M. Williams, *The History of Development and Current Status of the Carey Act in Idaho,* 5 (1970).

The government argues that the language of the statute is permissive because the Secretary is "authorized and empowered" to grant desert land to the state. However, an examination of the entire Act, including its nature and purposes, clearly shows that the duty to transfer title to the state was mandatory, once the state had complied with the conditions of the Act to reclaim desert lands.

It has been held on frequent occasions that the words used in a statute are not determinative of whether it involves a mandatory or discretionary duty. In *United States v. Reeb,* 433 F. 2d 381 (9th Cir. 1970), the court

stated that the word "shall" may be employed as an imperative or as a directory only, just as "may" may be mandatory. The court explained that "the interpretation of these words depends upon the background circumstances and context in which they are used and the intention of the legislative body or administrative agency which used them." 433 F. 2d at 383.

In *Wilshire Oil Company v. Costello,* 348 F. 2d 241 (9th Cir. 1965), the court concluded that "no rule of thumb exists as to what is merely 'directory' in a statute, and what is 'mandatory.' The word 'shall' in a statute may sometimes be directory only, or the word 'may,' seemingly much less forceful, may be mandatory. . . . A statute should not be construed as to be rendered meaningless." 348 F. 2d at 243.

The reading of the statute which the government urges would frustrate the clear congressional purpose behind the Carey Act. The Carey Act represented compromise legislation giving special rights of entitlement to desert land states in an effort to resolve long-standing disputes over the method of developing arid western lands. *See III Kinney on Irrigation and Water Rights,* 2388 et seq. (2d ed. 1912). Under this compromise, states were given a definite entitlement to desert lands, but to avoid speculation and misdealing, the federal government would retain title until the states had met the conditions of the Carey Act, and actually reclaimed desert lands. Giving unfettered discretion to the Secretary to approve or disapprove of Carey Act applications would nullify the congressional promise to western land states included in the Carey Act. That such was not the intent of Congress is clear not only from the Act's language, but also from the legislative history.

B. Congress intended the Carey Act to be a conditional grant to western states.

The legislative history of the Carey Act demonstrates that the congressmen understood that the states were given a conditional grant of land, with title to pass upon reclamation of the land by actual settlers. The report of the Secretary of Interior on the Senate bill notes that "the United States retains title until reclamation is accomplished and land occupied by actual settlers. This, if successful, is the great object to be obtained; and if unsuccessful the United States still holds the unencumbered fee." 26 Cong. Rec. 8390 (August 10, 1894).

In the House debate, Mr. Pickler, sponsor of the legislation in the House, explained the bill as "a proposition to donate each of the states . . . a million acres of such lands." 26 Cong. Rec. 8391-92 (Aug. 10, 1894). He continued:

> "Now here is a proposition which costs the government nothing, but simply donates these lands to the states, leaving them to bear the burden of irrigation and reclamation. Furthermore, it is provided that the title to these lands shall not pass to the states until it is shown to the satisfaction of the Secretary of Interior that the lands had been reclaimed according to law and the money expended upon them." *Id.*

There is nothing in the legislative history supporting the view that once a state had identified desert lands and requested their temporary withdrawal or segregation, the Secretary could arbitrarily deny the request. The only reference to discretion on the part of the Secretary, upon which the government mistakenly relies, refers to the duty of the Secretary to assure compliance with provisions of

the Act upon which the grant is conditioned. Understandable, if a state did not comply with the provisions of the Act, the Secretary was under no obligation to transfer title. However, the language of the Act itself and its legislative history make clear that it was the intent of Congress that lands be patented by the Secretary just as fast as the lands could be irrigated and reclaimed in compliance with the Act. Duties of the Secretary of Interior were to be ministerial in nature for the purposes of determining whether the conditions of the Act had been met.

In *Payne v. Central Pacific R. Co.*, 255 U. S. 228 (1921), this Court was confronted with a similar issue involving the denial of an exchange under an Act granting New Mexico the right to select certain lands for the support of common schools. The government argued that so long as the selection was without the Secretary's actual approval, it gave no right as against the government. The Court held, however, that the selection was like "the concluding step of one who, by full compliance, has earned the right to receive the title." 255 U. S. at 234. Likewise, a state reclaiming desert lands in compliance with the Carey Act performs the concluding step entitling it to a patent to the lands. The Secretary cannot foreclose the state by arbitrarily denying the state's Carey Act application.

The cases cited by the government are inapposite, since they arose under statutes granting interests in lands once certain conditions had been complied with. In the case of the Carey Act, the power conferred upon the Secretary is ministerial or judicial in its nature. His only function under the Act is to ascertain that the specified

conditions have been met, at which time the Secretary is obliged to issue a patent.

Subsequent legislative enactments underscore this interpretation of the Carey Act. The Act of June 11, 1896, 43 U. S. C. § 642 (1970), which followed the enactment of the Carey Act by only 2 years provides as follows:

> Under any law heretofore or hereafter enacted by any state, providing for the reclamation of arid lands, *in pursuance of and acceptance of the terms of the grant made in § 641 of this title, . . .* (Emphasis added.)

New legislative enactments by Congress have not abrogated the entitlements of the western states under the Carey Act. Indeed, in the face of repeal of a great many homestead and land grant statutes under the Federal Land and Policy Management Act of 1976 (FLPMA), 43 U. S. C. § 1701-1782 (1970), the basic provisions of the Carey Act have been left intact. FLPMA provided the mechanics for processing Carey Act withdrawal claims and preserved state entitlements under the Act. The Congressional policy of assisting the states in the reclamation of desert lands contained in the Carey Act and preserved through the years should not now be disregarded by reversing the lower court's decision.

C. Case law supports the lower court's decision.

This Court has previously recognized that the Carey Act requires the United States to transfer desert lands to the states once the conditions of settlement and reclamation are satisfied. The Court explained as follows:

> By the Carey Act the United States binds itself to donate, grant, and patent to a state, complying

with stated conditions, desert lands which the state may cause to be irrigated, or claimed, or occupied. The state is required to file a map of the land proposed to be irrigated, showing the plan of irrigation, etc., and is authorized to make contracts to cause the land to be reclaimed, and to induce their settlement and cultivation. Upon satisfactory proof the Secretary of the Interior is directed to issue patents to the states or its assigns. *Idaho Irrigation Co. v. Gooding,* 265 U. S. 518, 521 (1923).

This interpretation of the Act was also adopted by a federal district court in Idaho in 1933. In *Twin Falls Land and Water Co. v. Twin Falls Canal Co.,* 7 F. Supp. 238 (D. Idaho 1933). the court stated:

> By its terms (the Carey Act) . . . the United States offered to grant to states complying with the requirements of the enactment, large bodies of desert land. This statutory offer was formally accepted by the State of Idaho which laid down an elaborate and carefully guarded method of procedure for persons desiring to construct such projects and for settlers thereon.

Statements by the Supreme Court of Montana in two early cases also demonstrate common understanding concerning the operation of the Carey Act:

In *State v. Wright,* 44 P. 89 (Mont. 1896), the Supreme Court of Montana stated:

> The United States had the power to make the offer to the state, to grant it the lands provided the states would reclaim them. Of this there can be no doubt. . . . We believe the acceptance is valid. . . . The attitude of the state thereby became that of an agent of the United States, to make effective the offer of the latter to part with its desert lands estate or its assigns, provided the states can reclaim such lands, and induce the actual settlement and cultivation thereof. This the state has undertaken to make possible by legislation. If the state fails, the United States will not issue its patents. If the state succeeds, the United States has agreed to pass the title to the state, or its assigns, upon satisfactory proofs of the fulfillment of the acts of Congress. 44 P. at 92.

Two years later, the same court stated:

> The general government has by law made to the state conditionally a magnificent donation of lands. It is of the highest importance that the legislature of the states should make provision by law for performing the conditions upon which the right of the people to acquire the lands thus donated depends. *State v. Marshall,* 52 P. 268, 270 (Mont. 1898).

Each of these judicial pronouncements recognized that the intent of the Act is to make a conditional grant of an important resource to the desert land states. Once a state has accepted the grant and implemented the procedures necessary to comply with the Act's requirement, the grant becomes clear and absolute, resulting in the issuance of a patent by the Secretary. On the other hand, no judicial precedent exists for the assertion by the government that the Secretary has absolute discretion to grant or deny an application by a state willing to comply with the Act's provisions.

D. There is no consistent administrative interpretation contrary to the lower court's decision.

The government cites one case on point in favor of its argument that administrative interpretation favors its view of the Carey Act. A decision by the Secretary of Interior in *State of Wyoming,* 36 Pub. Lands Dec. 399 (1908), stands for the limited proposition that public lands properly withdrawn prior to the filing of the state's

application under the Carey Act are not available to the state. However, it must first be noted such a decision must be carefully scrutinized. Such an administrative decision can in large part be self-serving, inasmuch as the Department has generally attempted to interpret the Carey Act consistent with its own land development policies.

In the second place, the decision cannot be reconciled with the plain language of the Carey Act and its legislative history. Administrative interpretation is entitled to deference only where statutes are reasonably susceptible to different constructions. Federal courts are not obligated to follow administrative decisions that are inconsistent with statutory mandates or that frustrate congressional intent. *E. g., Volkswagenwerk v. FMC,* 390 U. S. 261 (1968). This is especially true where, as here, reliance is placed on a single administrative decision in 1908.

It should also be noted that the *Wyoming* case does not stand for any of the following propositions advanced by the government in the instant case: (1) that the Secretary has discretion to deny Carey Act applications as to unwithdrawn lands, (2) that the states have no enforceable entitlements, or (3) that the Secretary may arbitrarily refuse to classify desert lands to make them available for Carey Act entry.

The government also cites *Yakima Development Co. v. Washington,* 34 Pub. Land Dec. 453 (1906), but this case is not on point. The Secretary determined that the proposed project was not feasible because (1) it lacked sufficient irrigation water and (2) the state wanted to join the project with a federal reclamation project. The decision thus stands merely for the proposition that a state's proposal which does not meet the requirements of the Carey Act may be denied by the Secretary. This case illustrates the only kind of discretion which the Secretary is granted under the Act; namely, administrative discretion to determine whether the statutory requirements of the Act have been met.

This interpretation is confirmed by regulations promulgated by the Secretary to implement the Act. The Carey Act Regulations, 37 Pub. Lands Dec. 624 (1909), contain no provisions indicating that the Secretary has unfettered discretion to deny a proper application under the Act. The regulations reiterate the provisions of the Act and specify in detail the information and materials which the states must provide to comply with the Act's requirements. The clear implication in the regulatory language is that the Secretary's only function is to assure proper submittals by the states that the land is desert land, and that the irrigation proposal is adequate to irrigate the land.

The government also argues that the lower court's decision is contrary to present public policy in that it will hamper the Secretary in managing the public lands. However, the district court specifically found that the Secretary could perform his duties under the Carey Act in a manner which was consistent with his duty to classify and deal with lands in the public interest. The court stated:

> . . . the state may not perfunctorily select acreage previously withdrawn for other purposes, such as in this case a withdrawal for stock driveways. The Secretary is under an obligation to preserve enough desert land suitable for Carey Act development to

> fulfill the states' right of entitlement, which the federal government must contract to donate to the state in accordance with the Act. To the extent the land has been withdrawn for other purposes by the Secretary and the state remains desirous of initiating a Carey Act development on such acreage, its remedy is to petition the Secretary to reclassify the lands suitable for Carey Act entry. The Secretary may not arbitrarily deny the state's application for reclassification, withdrawal and Carey Act segregation. . . . Such a construction of the Carey Act is consistent with 43 U. S. C. A. 315 f and its proviso empowering and directing the Secretary to classify the public lands as more valuable or suitable for certain purposes upon application by a qualified applicant.

Thus, there is no evidence of any freezing or burden on the use of public lands in the western states. The Department is entitled to proceed with all classification programs, and may proceed to make withdrawals and dispositions as required in the public interest. Rights may be granted under the Desert Land Act or the Federal Land Policy and Management Act. The only constraint upon the Secretary is that he must manage public lands to carry out the objectives of the Carey Act as well; namely, to preserve enough desert lands for appropriate applications according to provisions of the Act and consistent with the right of entitlement granted each state by Congress. When a state requests segregation of unwithdrawn public lands or requests reclassification of withdrawn lands, well established Department procedures and appropriate judicial review can resolve any conflicts with respect to the use of the public lands.

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IV.

CONCLUSION

The development of sprinkler irrigation systems and deep wells as a source of water have opened up the possibility of reclaiming and irrigating thousands of acres of hitherto unusable desert lands in the western states. Such a potential should not be foreclosed by allowing the Secretary unlimited discretion to deny proper applications under the Carey Act. The language of the Act, its legislative history and existing judicial precedent all demonstrate that Congress mandated certain duties on the part of the Secretary of Interior. Public lands are protected against speculation by the conditions imposed in the Act, but once those conditions are met the states have a clear entitlement to the lands that had been identified and reclaimed. The lower court's decision is consistent with this interpretation and should be affirmed.

Respectfully submitted,

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APPENDIX A

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